United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1660

To be argued by
EDWARD BRODSKY

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOROTHY BOYD, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

and

INEZ STONEY,

Intervenor-Plaintiff-Appellee,

against

THE LEFRAK ORGANIZATION and LIFE REALTY, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS THE LEFRAK ORGANIZATION AND LIFE REALTY, INC.

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Questions Presented

1) Is appellants' application of their Economic Stardard to prospective tenants racially discriminatory in violation of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*?

2) Is the "business necessity" test, used in Fair Employment Act cases, applicable to the Fair Housing Act and if so, was it met in this case?

3) Is a finding of racially-motivated discrimination necessary for the Court to conclude there is a violation of the Civil Rights Act of 1866, 42 U.S.C. 1982?

4) Did the Court err in its admission of certain hearsay testimony and documents into evidence over the objection of appellants?

5) Is the Class properly constituted and are appellees representative of that class?

Preliminary Statement

Appellants Life Realty, Inc. and The Lefrak Organization ("Appellants"), appeal from an amended judgment ("Judgment") entered on April 29, 1974, in the United States District Court for the Eastern District of New York, after a trial before the Hon. Tom C. Clark, Associate Justice of the United States Supreme Court, Retired (sitting by designation), without a jury.

Appellants, in the rental of all their apartments, use, among other requirements, an economic standard requiring an applicant's weekly net income to equal at least 90% of the monthly rental of the apartment applied for (herein-

after referred to as the "Economic Standard" or the "90% Rule") (A844).*

The judgment declared appellants' 90% Rule in violation of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, *et seq.* ("Fair Housing Act"), and the Civil Rights Act of 1866, 42 U.S.C. § 1982 ("Civil Rights Act"), and enjoined appellants from applying the 90% Rule to the members of the class allegedly represented by appellees. Appellees conceded that there is no "state action" in the case.

Insofar as the class determination is concerned, originally, Judge Weinstein, over appellants' objection (A67a), fixed the class as, "all welfare recipients within the metropolitan area who may seek accommodations in buildings owned or operated by the Lefrak interests" (A67a). The Court below redefined the class as, "all public assistance recipients within the New York Metropolitan Area who have sought or may seek to rent accommodations in the residential buildings owned or operated by the Lefrak interests" (A866).

Appellant, Life Realty, Inc., is the rental agent for certain apartment buildings in Brooklyn and Queens, the locations of which are described in Exhibit "20". There is no legal entity known as The Lefrak Organization, although it is named as such in this action.

Statement of Facts

A. Background

On August 6, 1970, the United States of America, by the Attorney General, commenced an action (*"United States of America* v. *Life Realty, Inc., et al.",* 70 Civ., 964) to

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* There is some flexibility in this Rule. If an applicant's income is just short of the Economic Standard and other facts indicate that the applicant will be a reasonable economic risk, he or she will be accepted (A527).

prevent the defendants from continuing an alleged "pattern and practice of resistance" to the Fair Housing Act (E175). Appellants denied the allegations of the complaint. On January 28, 1971, a Consent Decree (Exhibit "G"), subsequently dissolved and dismissed with prejudice with Court (Weinstein, J.) approval on March 2, 1973, was entered into by the parties, thereby settling the litigation without an adjudication on the merits and without any admission by any party as to the existence or absence of liability (Exhibit "K").

Thereafter, in July of 1971, Dorothy Boyd, an appellee herein, attempted to rent one of appellants' apartments and was refused because of over-occupancy (A846). Subsequently, Mrs. Boyd moved to intervene in the original action commenced by the Department of Justice. That motion was denied by the Court (Weinstein, J.), which elected to treat Mrs. Boyd's application for intervention as a separate action (A847).

In March, 1972, Inez Stoney (intervenor-appellee) attempted to rent one of appellants' apartments and was denied an apartment because she did not meet the Economic Standard and she failed to find an acceptable guarantor (A848). On May 18, 1972, Mrs. Boyd moved to have this action declared a class action and Miss Stoney, moved to intervene (A848). The Court (Weinstein, J.) granted both motions (the intervention was unopposed) and, over the objection of appellants, created a class consisting of "all welfare recipients within the metropolitan area who may seek accommodations in buildings owned or operated by the Lefrak interests" (A66a, 67a).

On March 2, 1973, the Court (Weinstein, J.), on motion of the defendants, unopposed by the government, dissolved the Consent Decree and the action relating thereto was dismissed, with prejudice (A846).

B. Facts Relating to Members of the Class Who Testified at Trial

1. *Dorothy Boyd*

In July, 1971, Dorothy Boyd came to the Life Realty, Inc. ("Life Realty") office in Brooklyn, New York, and asked to see Apartment 5C at 1035 Clarkson Avenue, Brooklyn, New York, a two-bedroom apartment (A746). After visiting the apartment, Mrs. Boyd told Mrs. Reba Gelman, an employee of Life Realty, that she wanted to rent that apartment (A746). Mrs. Boyd, who has five children (A848), was told by Mrs. Gelman that since she applied for a two-bedroom apartment and there would be six people occupying it (Mrs. Boyd and her five children), the building occupancy standards would be violated. Those standards provide for a maximum of four people in a two-bedroom apartment* (Exhibit "U").

2. *Inez Stoney*

In March, 1972, Inez Stoney came into the Life Realty offices and asked to see apartment 4T at 393 East 92nd Street, Brooklyn, New York, a two-bedroom apartment. The agent at the office arranged for access and Miss Stoney went to the apartment, inspected it and returned to the Life Realty offices, expressing her desire to rent the apartment (A848). Upon learning that Miss Stoney was a welfare recipient, the agent handed her a copy of a statement which had been prepared for welfare recipients, pursuant to the Consent Decree outlined above (A748). Miss Stoney was informed that if she could not meet the income requirements, she could obtain a private guarantor (A849). Miss Stoney was unable to produce an acceptable private guarantor and the apartment was rented to someone else.

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* A large sign delineating the occupancy standards was posted on the wall of Life Realty (Exhibit "U"). These occupancy standards are *not* being challenged by appellees.

3. *Shirley Lee*

In December, 1971, Shirley Lee, a welfare recipient* A82), came to the Life Realty offices in Brooklyn, New ork, and thereafter inspected Apartment 215 at 2524 ostrand Avenue, Brooklyn, New York, a four-room apart- ent, renting for $295.00 a month (A66, 67). Thereafter, rs. Lee returned to Life Realty and told Mr. Cuccia, an nployee, that she would like to rent the apartment A67). Mr. Cuccia told her she would have to go to the elfare Department and have the rent approved and that ecause she did not have sufficient income, she would have procure a guarantor (A67, 68, 72).

Thereafter, Mrs. Lee returned with a guarantor, one Mr. orset, a friend of her mother's, and a man she barely ew (A68, 73, 78-81, 87). Mr. Dorset's guarantor appli- tion contained material misrepresentations and he was jected as a guarantor (A849). The fact that Mr. Dor- t's application contained material misrepresentations is t disputed. Mrs. Lee did not obtain a different guaran- r.

Appellants' Operations

Appellants operate 119 buildings within the City of New ork, containing 15,484 apartments (A854), with rental nges running from $140 to $400 per month (Exhibit

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* Mrs. Lee testified that she had been turned away by other ndlords because she was on welfare (A73, 74), but not by pellants:

"Q. Did you have a conversation with Mr. Cuccia?"

"A. Yes."

"Q. What was that conversation?"

"A. The conversation was 'if you rent to welfare clients' and he told me 'Yes' 'and I would have to go down to welfare to see if they would OK the amount, if I seen one that I liked.'" (A66)

"Q"). The Court below erroneously found that appellants' rental range ran from $150 to $300 per month (A854).

Appellants, in the rental of their apartments, use, among other requirements, an economic standard requiring applicants' weekly net income to equal at least 90% of the monthly rental of the apartment applied for (A844). The applicant may also meet this Economic Standard by providing an acceptable guarantor or by obtaining the guarantee of a government agency (A844).

The Economic Standard and guarantee requirements were agreed to by appellants and the Department of Justice with the approval of the Court (Weinstein, J.) in a 1971 Consent Order (A846, Exhibit "J"). Previously, appellants had used the "rule-of-thumb" prevalent in the real estate industry, i.e., one week's gross income should equal one month's rent (A525). The government requested the 90% net income provision to make it somewhat easier for lower-income people who pay less taxes and, in some cases, no taxes, i.e., welfare recipients, to qualify for appellants' apartments (A690). The 90% rule has been uniformly applied by appellants to all applicants for appellants' apartments and each application is measured by the same objective standard.

Appellants' buildings within the City of New York are fully integrated, a fact which has been admitted by appellees (A50, 51). Appellants have announced their non-discriminatory policies in instructing their employees to treat all applicants and tenants the same, without regard to race, color, creed or national origin (Exhibit "P"). During the life of the Consent Decree, racial statistics for the Borough of Brooklyn were kept pursuant to the terms of the Decree (A530). Over one-fourth (26.02%) of the Brooklyn apartments were rented anew during that two-year period and 48.07% of those apartments were rented to blacks (Exhibit "G"). This occurred in a city where 21% of the total population is black (A855).

D. Department of Social Services Procedure

At the time of trial, welfare recipients, pursuant to a New York State statute, were receiving (apart from shelter allowance), only 90% of what the State has determined would be their minimum standard of need. Social Services Law, N.Y. § 131-a, McKinney's Consolidated Laws, c.55, as amended by Chapter 133 of the Laws of 1971. Welfare recipients in the City of New York receive this allowance, as well as a shelter allowance, through the New York City Department of Social Services ("DSS").

The agency does not pay the rent directly to the landlord. A recipient is given a rent allowance along with other funds prescribed by statute and receives these monies in two monthly checks, payable to the recipient, each of which contains one-half of the monthly rent allotment and one-half the statutory allotment for food and clothing (A340, 344). These funds are not identified or segregated and it is up to the recipient to budget his funds so as to pay for rent and other necessities (A347). DSS does not follow up to see that the rent is being paid (A347).

If a welfare recipient defaults in the payment of rent and the landlord has commenced an eviction proceeding, at which time the tenant is by definition a problem tenant, then DSS for the future may issue a shelter allowance check payable both to the tenant and to the landlord ("two-party check") (A341). That check is sent to the welfare recipient—not the landlord—and often landlords do not ultimately receive those checks (A352).

DSS does not provide additional sums to pay back rent for welfare recipients. Thus, by the time a two-party check is issued, the tenant is behind in his rent payments, is receiving an allowance of 90% of the minimum required amount for food, clothing and other necessities, and obviously is in a financial bind.

When DSS does provide a two-party check for rent in arrears, the recipient must first execute a waiver authorizing DSS to deduct from future checks the sum being advanced in the two-party check (A353). Thus, until the amount advanced in the two-party check is returned to DSS, the welfare recipient receives a reduced allowance (A353). This makes it much more difficult to pay future rent—particularly when the recipient is receiving 90% of bare minimum necessity for food and clothing.

When a welfare recipient defaults in lease payments, DSS will take no action to motivate the tenant to meet his obligations under the defaulted lease (A353). When a welfare recipient moves out of an apartment before the expiration of a lease, DSS takes no action to attempt to have the tenant meet his lease obligations (A353). That welfare recipient is treated by DSS like any other person on welfare looking for an apartment, despite the fact that there is an enforceable unexpired lease which he has executed on another apartment (A353).

E. The Economic Standard and Appellants' Rentals

Appellants adduced expert testimony through Dr. Emmanuel Tobier, professor of economics at New York University specializing in housing and urban economics (A581, 582) and now Chairman of the New York Rent Guidelines Board, and Roger Starr, Executive Director of The Citizens Housing & Planning Council of New York, Inc., (A656) and now Commissioner of Housing and Development in New York City, that a determination of a prospective tenant's ability to pay rent by an economic formula is a matter of business necessity to any landlord and that a prospective tenant's income (from whatever source) is determinative of the amount of money available for the payment of his rent (A614, 665).

Dr. Tobier testified that the buyer-seller relationship in this instance being a continuing one, there was a necessity

for the landlord to attempt to measure the buyer's (i.e., the tenant's) ability to pay rent on an on-going basis (A614). There was testimony from every witness who testified on the subject, including appellees' experts (who admittedly knew nothing about the economics of what is necessary to run a building) (A134, 433), that some economic standard is used in evaluating a tenant's ability to pay rent by private landlords and, indeed, by Government agencies (A205, 267).

Appellants' Economic Standard requires that an apppli-cant's weekly *net* income, i.e., after taxes and other deductions, equal to at least 90% of the monthly rental of the apartment applied for (A844). Thus, if an apartment rents for $200 per month, the applicant's weekly net income should be at least $180.

The industry-wide standard that is used by landlords in the City of New York is that an applicant's *gross* weekly salary (before taxes) be at least 25% of one month's rent (A635-637, 658). This is precisely the standard used under federal statutes when determining the economic qualifications of a person applying for an apartment in a federally-subsidized building, 12 U.S.C. § 1715z-1(f) 42 U.S.C. § 1402(1). Thus, if an applicant earns at least $200 per week gross, he may rent an apartment for $200 per month.

Appellants' Economic Standard as applied to welfare recipients who pay no taxes, is roughly equivalent to the New York City industry-wide standard as applied to people who pay taxes. This is a matter of simple mathematics, which was demonstrated at trial by Dr. Tobier (A645), and was admitted by appellees' witness, Dr. Bickel, who testified that appellants' Economic Standard when applied to welfare recipients, was equivalent to allowing the recipient to pay 25.65% of their income for rent (A216). Appellants' Economic Standard, as applied to people who pay taxes, is roughly equivalent to a standard of 22% (A645), meaning that a person must earn at least approximately $209 per

week gross (based on 4⅓ weeks to a month) to rent an apartment for $200. per month.*

Thus, appellants' Economic Standard, as applied to welfare recipients, is not only equivalent to the New York City industry-wide standard, but also is less stringent when applied to low-income people, as they pay less taxes, and it is even more liberal when applied to welfare recipients, as they pay no taxes at all (A265, 655, 656).

Assuming that welfare recipients were granted by the Department of Social Services the full rent of one of appellants' apartments—the maximum that would be granted to any welfare recipient—they would be paying, on average, from 53.5% to 69.7% of their income in rent (Exhibit "S"). Allowing for such non-cash items as food stamps (Dr. Tobier testified that an extremely generous allowance would be 25% of the non-rent allowance) (A608), the welfare recipient would still be required to pay between 47.8% to 64.8% of his income in rent (Exhibit "S"). These are disproportionate amounts to pay for rent in relation to welfare grants.

The average lower-income family in the City of New York, paying more than 25% of their net income in rent, is paying less than $100 per month in rent (Exhibit "W"). That rent figure is considerably below appellants' average rentals, which range from $140 to $400 per month (Exhibit "Q"). In the City of New York, as the monthly rent rises to a point where it approaches appellants' apartment rentals, the percentage of income paid for rent ranges from a maximum of 25% down to 7% (Exhibit "W").

Both of appellants' experts, each of whom has extensive experience in and knowledge of the rental housing field,

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* The aforesaid amounts are approximations because people with different incomes and under different circumstances pay varying amounts in taxes.

testified that in their opinion, an economic standard in the area of 25% of gross income for one month's rent (a standard approximately equivalent to the 90% Rule, as applied to welfare recipients, is a reasonable business standard in line with a tenant's ability to pay rent (A598, 680).

F. Errors by the Court in Its Findings Unsupported by the Record

There are several material facts found by the Court which are unsupported by the record, as follows:

The Court below found that appellants' 90% Rule takes into account none of the non-cash income of welfare recipients, while non-recipients are cautioned to add every item of income, including non-cash bonuses included in group health insurance policies (A858). There is no support in the record for that finding. Appellants respectfully direct the Court's attention to the only evidence (directly contradictory to the Court's finding) in the record relating to this finding, the testimony of Mr. Cuccia (A728, 730, 743, 744).

The Court below found that appellants' apartments have rental rates running from $150.00 to $300.00 per month. There is nothing in the record to support such a finding, and appellants respectfully direct the Court's attention to the fact that rentals on appellants' apartments range from $140.00 to $400 per month (Exhibit "Q").

The Court below found that appellants "produced no evidence as to the ethnicity of their buildings in other boroughs, including Queens" (A855). Appellants respectfully direct the attention of the Court to the testimony of Jerry Richter, Vice President of Lefrak Management Co., that Lefrak City, a complex of 4,600 apartments,*

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* More than 25% of appellants' apartments, city-wide and approximately the same number as in Brooklyn (A855).

which is located in Queens, New York is approximately 40% black (A577).

The Court below improperly found that testimony given by Ruth Balen* that she had called Jerry Richter of Lefrak Management and that Mr. Richter told her that appellants had a policy against renting to welfare recipients because of a fear of maintenance problems "stands uncontradicted" (A847). Appellants respectfully direct the Court's attention to the fact that Mr. Richter testified to the contrary.**

The Court below found that appellants kept no records as to the classification of their tenants by race, except during a fourteen month period covered by the Consent Decree. Appellants respectfully direct the Court's attention to the fact that these records were kept for a two-year period (A530, Exhibit "G").

The Court below found that "It is difficult, if not impossible, for the average black or Puerto Rican applicant to secure a white guarantor . . ." (A851). There is nothing in the record to support such a finding.

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* Attorney for Appellees.

** "A. . . . I recall, specifically, maybe more than one statement was referred to that we don't desire welfare tenants, which is ridiculous."

"Q. Did you ever say that to anybody?"

"A. No. I didn't."

"Q. On the telephone or personally to anyone?"

"A. On the telephone?"

"Q. Or anyplace else."

"A. The statement was made that we didn't take welfare tenants because they destroyed property, which is untrue."

"Q. Did you ever say that to anyone personally or on the phone to anybody?"

"A. Never." (A544)

POINT I

The Court below erred in finding a violation of the Fair Housing Act because appellants' economic standard does not result in racial discrimination.

Appellants, during the period 1971 to 1973 rented approximately one-half of all its available apartments in Brooklyn to blacks (Exhibit "G"), although only 21% of people living in New York City are black. The reliance of the Court below on a document (Exhibit 30), which we urge was improperly admitted in evidence (see Point VII *infra*), to show that thirty-seven of appellants' buildings in Brooklyn were entirely segregated in January, 1969 (A855), is, misplaced.

The Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("Fair Housing Act"), prohibits discrimination in housing because of "race, color, religion or national origin". It requires that all persons have equal access to housing on a non-discriminatory basis. See *United States* v. *Grooms*, 348 F.Supp. 1130 (M.D. Fla., 1972). This means that landlords should treat all persons equally, in the sense that people with substantially the same income and economic status should be treated the same.

This does not mean, and no case has ever held, that landlords in the private sector must lower their economic standards to accommodate a special class of low-income people.

As this Court has recently said "there is no requirement that welfare recipients . . . may secure apartments . . . without regard to their ability to pay". *Male* v. *Crossroads Associates*, 469 F.2d 616, 622 (2d Cir., 1972). Courts have recognized that landlords have the right to inquire into a prospective tenant's ability to pay rent and to formulate reasonable rental standards, and that landlords are not required to accept welfare recipients

who would be "required to devote an unreasonable portion of their income to the payment of rent, thereby making non-payment a likelihood". *Colon* v. *Tompkins Square Neighbors Inc.*, 294 F. Supp. 134, 138 (S.D.N.Y., 1968).

As proof of the fact that appellants' Economic Standard is not racially discriminatory, the uncontroverted evidence is that with respect to appellants' buildings, there is no racial effect or discrimination. When racial statistics were kept, pursuant to the terms of the Consent Decree for appellants' buildings in Brooklyn (representing about 5,000 apartments or 32% of all appellants' buildings), approximately 50% of those apartments which became vacant in that two-year period were rented to blacks (Exhibit "G"). This, in a community where only 21% of the people are black (A855). This uncontroverted evidence is particularly striking because it shows that a substantially greater percentage of minority groups live in appellants' buildings than in New York City.

Even based upon what we believe to be erroneously admitted evidence, as further explained in Point "VII", *supra* the Court below found that the percentage of blacks in appellants' apartments in Brooklyn is 19.8% (A855), and criticized appellants because this percentage was "lower" than the percentage of blacks (21%) in New York City (A855). To suggest, as does the Court below, that being within 1.2% of the city-wide racial balance is discriminatory, runs counter to both the letter and the spirit of the Fair Housing Act. Research reveals no case that has held that percentages of this type must exactly coincide in order to avoid being labeled discriminatory. The Court below, by virtue of its underlying findings, is precluded from making the ultimate finding of a racially-discriminatory effect.

Thus, we urge, contrary to what the Court below held, the application of appellants' Economic Standard has no

direct or indirect racial effect upon blacks and Puerto Ricans and there is no violation of the Fair Housing Act.

The Court relied in its holding that appellants' Economic Standard is discriminatory on several cases which are distinguishable because the "insidious and subtle" (A861) discrimination found in those cases were, in reality, thinly-veiled stumbling blocks, a rarily placed in the way of individual applicants for apartments. Those cases are not analogous to the instant case and their "standards" are not analogous to appellants' Economic Standard which is even-handedly and universally applied to all applicants for appellants' apartments.

Thus, for example, in *United States* v. *Grooms, supra* (A861), two black plaintiffs attempted to rent a site at a mobile home park which had never had a black tenant. The landlord told the applicants they would have to get three references from persons already living in the park, despite the fact that no other applicants had been asked for references in the past.

There was no uniform standard which was uniformly applied, as is appellants' Economic Standard. The Court found a pattern and practice of discrimination based on (i) the use of a standard for a black couple, but for no one else, and (ii) the fact that no blacks had ever lived in the park. It was a simple case of a standard developed for blacks and applied only to blacks. The situation is entirely inapposite to the one in the case at bar where appellants' buildings are fully integrated and where appellants' Economic Standard is uniformly applied.

In *United States* v. *Gilman*, 341 F. Supp. 891 (S.D.N.Y., 1972) (A861), the government alleged seven instances of discrimination in violation of the Fair Housing Act. The Court found a violation in two cases. One involved a statement by the landlord to a tenant to "make sure your friends are white". The second involved a mixed couple

(the husband was black and the wife was white) to whom the landlord applied a different standard than he did for whites. *United States* v. *Gilman, supra,* follows the same pattern of *United States* v. *Grooms, supra,* in that the landlord arbitrarily and discriminatorily applied a standard not applied to any other tenant. This case bears no resemblance to, and is inapplicable to, the case at bar.

In *Male* v. *Crossroads Associates, supra,* the landlord did not have one standard for all applicants and in fact, arbitrarily refused to take welfare recipients' applications for apartments solely because they were welfare recipients. There was no neutral economic standard applied to all. Indeed, the landlord applied no economic standard whatsoever, but relied totally on subjective factors. These, we suggest, are hardly the type of cases which support the conclusion of the Court below that appellants' practices are "insidious and subtle" having a racial effect (A861).

Appellants respectfully submit that in none of these cases did the Court hold that an economic rental practice and/or standard, neutral on its face and evenhandedly administered, may be discriminatory in effect, but held only that a rental practice, neutral on its face, was administered in a discriminatory manner. In the instant case, appellants' rental practices are administered in a non-discriminatory manner, with everyone being treated the same.

The cases cited by the Court are rife with extreme, arbitrary and unfair conduct by the landlord, a situation completely at odds with that in the case at bar. It is respectfully submitted, that appellants have complied with both the spirit and the letter of the Fair Housing Act and that appellants' Economic Standard does not result in any discrimination because of race, color, religion or national origin.

POINT II

There was no violation of the Fair Housing Act because appellants have shown the "business necessity" for the application of their economic standard.

The Court below erroneously applied to the instant case the "business necessity" test applicable to Fair Employment cases, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), as its authority (A861). As applied here, the test would be whether appellants' Economic Standard is justified by the "business necessity" of measuring a prospective tenant's ability to pay the rent of the apartment applied for. It is respectfully submitted that this test has never been applied in any Fair Housing Act case, either public or private, and further that it is inappropriately applied in the instant case.

Moreover, even if the "business necessity" test of Fair Employment cases applies, a necessary element is missing from the Court's findings—that is—a past history of discrimination and a policy which renews or exaggerates that discrimination. The principle was stated by this Court in *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652, 662 (2d Cir., 1971):

> "When an employer or union *has discriminated in the past,* and when its present policies *renew* or *exaggerate discriminatory* effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." (emphasis supplied)

The record and the findings of the Court are barren of (i) any past discrimination on the part of appellants and (ii) any renewal or exaggeration thereof as a result of appellants' application of their Economic Standard. Indeed, the evidence shows that over the years, appellants had a policy, as testified to by Mr. Richter (Vice President

of Lefrak Management Corp.), Mr. Cuccia and Mrs. Gelman (employees of Life Realty Inc.), of not discriminating against anyone (A526, 715, 750). Witness the fact that large numbers of blacks and Puerto Ricans are tenants in appellants' buildings.

Assuming, *arguendo,* that the "business necessity" test is applicable in the instant case, it is respectfully submitted that appellants' Economic Standard does no violence to that test. While it is a matter of common sense, appellants adduced expert testimony through Dr. Emanuel Tobier, professor of economics at New York University specializing in housing and urban economics (A581, 582), and Roger Starr, Executive Director of The Citizens Housing & Planning Council of New York, Inc. (A656), that a determination of a prospective tenant's ability to pay rent by an economic formula is a matter of business necessity to any landlord and that a prospective tenant's income (from whatever source), is determinative of the amount of money available for the payment of his rent (A614, 665).

Dr. Tobier pointed out that the buyer-seller relationship in this instance being a continuing one, there is a necessity for the landlord to attempt to measure the buyer's (i.e., the tenant's) ability to pay rent on a continuing basis (A614). There was testimony from every witness who testified on the subject, including appellees' experts, that some economic standard is properly used in evaluating a tenant's ability to pay rent by private landlords and, indeed, by government agencies.

Moreover, the Courts have recognized the landlord's right to establish rental standards to measure the prospective tenant's ability to pay rent. In *United States* v. *Grooms, supra,* p. 1134, the Court stated:

> "This Court recognizes that the defendants have the right to formulate and implement reasonable, objective, and nonracial rental standards and procedures, and to

> inquire into the background and habits of prospective tenants *and their ability to pay the rent.* Such standards and procedures are necessary . . .
>
> • • • • • •
>
> Procedures for evaluating applicants should, . . . be as objective and uniform as possible . . .". (emphasis supplied)

Appellants' Economic Standard is objective and uniform on its face as well as in its application.

With respect to whether appellants' Economic Standard is a reasonable one, all the experts agreed that the landlord has an economic interest in how much a tenant earns. It is respectfully submitted that the Court below erred in determining that appellants' Economic Standard was unreasonable (A861) because it had no basis upon which to hold, as it did, that the allotting of 49% of one's income to rent, if the tenant so desires, is a reasonable business risk for a landlord to take (A856).

The Court further cites *Colon* v. *Tompkins Square Neighbors, Inc., supra,* and *Battle* v. *Municipal Housing Authority for the City of Yonkers,* 53 F.R.D. 423, 428 (S.D.N.Y., 1971) (both public housing cases), as the basis for its finding that a policy less stringent than appellants' Economic Standard would be sufficient to fully protect appellants in collecting their rent (A860). Appellants respectfully submit that these cases have nothing to do with an economic standard applied identically to all (in fact, in neither case was any economic standard applied).

In *Colon* v. *Tompkins Square Neighbors, Inc., supra,* there was a systematic exclusion from a public housing project of all welfare recipient applicants. The regulations regarding admission policies were not made available to prospective tenants and *the applications were not processed in accordance with any ascertainable standard.* The Court found that plaintiffs were rejected *solely* on the basis of

their status as recipients of welfare funds. Appellants have never rejected an applicant on that basis nor have welfare recipients been systematically excluded from appellants' buildings.

In *Battle* v. *Municipal Housing Authority for the City of Yonkers, supra,* the Housing Authority required welfare recipients, *and only welfare recipients,* to have their leases co-signed by the Department of Social Services, a practice unacceptable to the Department. Thus, welfare recipients were once again barred *solely* because of their status as recipients of public funds. The Court put it very clearly, stating:

> "The effect of the discrimination is to bar *all* welfare tenants and *only* welfare tenants . . ." 53 F.R.D. 428.

As has been shown, appellants' policy does not bar either all or only welfare recipients—it bars only people who cannot meet the Economic Standard. In all of the cases relied upon by the Court, welfare recipients were treated separately as a class and denied housing for the sole reason that they were recipients of welfare funds.

The Court below had no basis upon which to hold that appellants would be taking a reasonable business risk by accepting tenants into these relatively high-rent apartments (for people on welfare subsistence) at the income level dictated to welfare recipients.

Dr. Tobier testified that the 90% Rule was roughly equivalent to a 22% standard based on gross income (for those who pay taxes) and about a 25% standard for welfare recipients (who pay no taxes) (A645). Appellees' own expert witness* testified that the economic standard

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* Appellants challenge the conclusion that appellees' "experts", Dr. Bickel and Dr. Indik, qualify as experts in matters applicable to the issues in this case. See Point IV, *supra.*

for welfare recipients was equivalent to 25.65% (A216). Thus, the 90% Rule is roughly equivalent to the 25% standard in general use in the real estate industry in New York City.

Dr. Tobier testified, and it is self-evident, that the 90% Rule, keyed to net income after taxes, is less stringent when applied to low-income people, as they pay less taxes, and that it is even more liberal when applied to welfare recipients, as they pay no taxes at all (A655, 656). In spite of this, Dr. Tobier demonstrated that welfare recipients would have to pay a disproportionate amount of their income in rent in order to live in appellants' apartments (Exhibit "S").

Even assuming that welfare recipients were granted the full rent of appellants' apartments—the maximum that would be granted to any welfare recipient—they would be paying on average rental apartments from 53.5% to 69.7% of their income in rent (Exhibit "S"). Even when allowing 25% for such non-cash income items such as food stamps (Dr. Tobier testified an extremely generous allowance would be 25% of the non-rent allowance (A608), and this testimony was not challenged), the welfare recipient would still be required to pay from 47.8% to 64.8% of their income in rent (Exhibit "S"). Those amounts are excessive and no landlord should be required to take the risk of having a tenant pay that portion of his income in rent.

The 90% Rule is reasonable. It is generally in line with the industry-wide standard of 25% of gross income* and

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* Appellees' own expert so testified:

"The Court: So the 90% would equal .2565?

"The Witness: If gross income and net income were identical in all respects, yes, the 90% rule would correspond to .2565." (A216).

the economic standard used by the Federal Government in various programs. For instance, 12 U.S.C. § 1715 "Section 236 Program" (rental and cooperative housing for lower-income families) provides:

> "12 U.S.C. § 1715z-1(f) . . . The rental for each dwelling unit shall be at the basic rental charge or such greater amount, not exceeding the fair market rental charge, as represents 25 per centum of the tenant's income."

In addition, in 1969, The Public Health and Welfare Law was amended to limit all low-rent public housing rents to one-fourth (25%) of the family income":

> "42 U.S.C. § 1402(1) . . . The dwellings in low-rent housing shall be available solely for families of low income . . . income limits for occupancy and rents (*which may not exceed one-fourth of the family's income, as defined by the Secretary*) shall be fixed by the public housing agency and approved by the Authority . . .". (Emphasis supplied)

Senator Brooke, with respect to the above amendment, said that a disproportionate share of one's income should not be allocated to housing—disproportionate being more than 25%. See 115, *Congressional Record*, Part 20, pp. 26721-26722.

The Federal Government in public housing requires that rents be reduced so that they are no higher than 25% of a tenant's income. Appellants are not suggesting that this principle of rent reduction should be applied to the private sector. However, to compel a private landlord to accept a tenant who must pay more than 50% of his income for rent is even worse than forcing a rent reduction because if the tenant will not be able to afford the rent, a lease will be in default, the tenant will be

evicted and the landlord will be required to incur the substantial additional expenses of repair, repainting, reletting and legal fees in connection with the eviction.

Dr. Tobier testified that a 25% standard is generally in line with what average low-income families in the New York area actually pay for shelter (A587). Appellants submit that this is sufficient. The Fair Housing Act does not require a landlord to prove to a mathematical certainty that an applicant will default, nor does it preclude a decision based on general income information of the kind on which a landlord might reasonably act.

The Court below found that 39.1% of New Yorkers pay more than 25% of their gross income in rent (A858). Conversely, however, 60.9% pay less. It is important to emphasize, as Dr. Tobier demonstrated (Exhibit "W"), that those who pay more than 25% of their income in rent are actually paying a very low average rent—$90-$97 per month—(appellants have no apartments at those rentals) —while those paying average rents above $100 per month were actually paying only 8% to 25% of their income in rent.*

Appellees' expert, Dr. Bickel, testified that a Rand Institute Study** concluded that the average low-income tenant could afford to pay up to 37.4% of his income in rent (A132). But, this statistic is grossly misleading. An examination of the schedule upon which Dr. Bickel based his findings shows that as rentals rise (along with the size of the family), the rent-to-income ration decreases from 46% for one person, down to 24% for a family of six.

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* The percentage decreases as the rent rises (Exhibit "W"). Appellants' lowest rental is $140.00 per month (Exhibit "Q").

** Rental Housing in New York City, Volume II, The Demand For Shelter, R-649-NYC, June, 1971.

(The maximum number of persons allowed under appellants' occupancy standards is six.)

Even more importantly, the gross rentals being paid in the Rand Study range from $100 per month ($1,220 per year) for a family of one to $150 per month ($1,800 per year) for a family of six, which would would need a larger apartment. These rentals are considerably below average rentals of appellants, which range from $175 per month for a small apartment ($2,100 per year) to $350 per month (4,080 per year) for a large apartment (Exhibit "S").

The findings of the Court below, based upon the conclusions adduced from Dr. Bickel, bear no relationship to the realities of appellants' rentals. Moreover, Dr. Bickel testified that even if his average rent-income ratio of 37.4% adduced from the Rand Study is used, welfare recipients would not be able to afford appellants' average apartments (A284), which would require of the welfare recipients a rent-income ratio running from 53.5% to 69.7% (Exhibit "S") because such a rent-income ratio according to the Rand Study, would not leave the recipient enough money to pay for other necessities.

Both of appellants' experts, each of whom has extensive experience in and knowledge of the rental housing field, testified that in their opinion an economic standard in the area of 25% of gross income for one month's rent (a standard approximately equivalent to the 90% Rule), is a reasonable business standard, in line with a tenant's ability to pay rent (A598, 680).

The Court below cites *Findrilakis* v. *The Secretary of the Department of Housing and Urban Development,* 357 F.Supp. 547 (N.D.Calif., 1973), as controlling (A861) in the instant case, and as an example of a Court's striking down a rent-income ratio requirement as having no relationship to ability to pay rent, stating that the 35% rent-income ratio in that case was even more liberal than the

Economic Standard in the case at bar (A861). But an examination of that case shows that that Court based its decision on elements totally unrelated to and not present in the case at bar.

First and most importantly, no violation of the Fair Housing Act was alleged. Secondly, the case involved a public housing development. We are dealing with a private landlord and appellees have conceded that there is no "state action" in the case—thus none of the "state action" cases apply. *Powe* v. *Miles*, 407 F.2d 73 (2d Cir., 1968). Thirdly, the 35% standard is not comparable to appellants' Economic Standard as they are totally unrelated. As noted below, *amounts were deducted from income for each minor child of the applicant.* This had the effect of reducing income and increasing the rent-income ratio as the family grew larger. Nothing like that was done in the instant case.

The two factors relied upon by the Court in *Findrilakis* v. *The Secretary of the Department of Housing and Urban Development, supra,* were:

1) The 35% standard was chosen for the avowed purpose of keeping those eligible for public housing out of government-sponsored housing in violation of a mandated congressional preference;

2) "Adjusted" income was used, a figure arrived at by deducting 5% for taxes and $300.00 per year for each minor who were members of the family and living with the family, a method which discriminated against low-income and welfare tenants.

As can be seen from the above, the rules were applied in such a way as to have a discriminating effect on low-income and welfare applicants, in violation of a statute, an effect not felt by higher-income applicants. This was compounded by the fact that a 5% deduction was made for taxes from

the income of welfare recipients who paid no taxes, a practice contrary to appellants' practice, which in actuality favors the low-income applicant (A265, 655, 656). It is respectfully submitted, that the Court below erred in relying on *Findrilakis* v. *The Secretary of the Department of Housing and Urban Development, supra,* as controlling with respect to "business necessity".

Moreover, an examination of *Griggs* v. *Duke Power Company, supra,* cited as the authority for the application of the "business necessity" rule in the instant case, shows that it is inapposite.

In Griggs v. *Duke Power Company, supra,* the Court gave a complete recital of a pattern of discrimination which limited blacks to only one (the lowest paying) of five operating departments. In 1955, the company instituted a policy of requiring a high-school diploma for initial assignment to all departments except labor, and in 1965, when abandoning its policy of restricting blacks to labor, a high-school diploma, along with passage of some personnel tests, were made prerequisites for the transfer from labor to any other department. These requirements were not, however, applied to those already employed in the other four departments (whites) who continued to perform satisfactorily and achieved promotions. Additionally, the evidence showed that employees who had not taken the test or completed high school continued to make progress and perform satisfactorily. The Court said:

> "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial . . . classification." (401 U.S. 431)

An important consideration for the Court was the fact that § 703(h) of Title VII deals directly with the usage

of employment tests, authorizing:

> "any professionally developed ability test . . . that is not designed, intended or *used* to discriminate because of race . . ." (401 U.S. 433)

This section was further implemented by Equal Employment Opportunity Commission ("EEOC") guidelines, which provide:

> "The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII. . . . These guidelines demand that employers using tests have available 'data demonstrating that the test is predicative of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated'." (401 U.S. 433)

The Court found that there was good reason to treat the guidelines as expressing the will of Congress and ruled that the tests did not comport with the rules requirements. The overwhelming facts, the statute and the rules, all elements not present in the instant action, virtually dictated the Court's decision that the criteria were unrelated to job performance and racially discriminatory.

In short, there was (i) a past policy of direct racial discrimination; (ii) new criteria established which worked to perpetuate that policy; and (iii) a statute and Commission guidelines which focused directly on the criteria, all of which are not part of the case at bar.

The attempt of the Court below to tie the Fair Housing Act to the Fair Employment Act fails because of the special nature of the latter, explicit statutory and regulatory provisions which apply only to the latter, the context in which the employment cases were decided and other unusual and extreme circumstances present in all of the cases, circumstances which are not hinted at or analogous to those in the case at bar.

As has been more fully stated in Paragraph "D" of the Statement of Facts, *supra,* for the purposes of a landlord's ability to collect rent, the welfare recipients are in the same position as other prospective tenants. The procedures of the DSS do not provide the landlord with any additional protection. There is no separation of rent money and the funds are sent directly to the welfare recipient—not to the landlord. Moreover, welfare recipients actually begin from a deficit position, receiving only 90% of their minimum standard of need (apart from shelter allowanec), Social Services Law, New York § 131a, McKinney's Consolidated laws, c.55 as amended by Chapter 33 of the laws of 1971, and if they default on the payment of the rent and receive an advance from DSS, are driven further in debt by DSS's recoupment policy.

In fact, once the welfare recipient falls behind in the rent, DSS's policy actually encourages him to default under the lease as he is freed from the recoupment policy and treated the same as is any other welfare recipient searching for an apartment, despite the fact that there is an unexpired enforceable lease outstanding to which the recipient is legally committed.

Courts, when specifically addressing themselves to a landlord's obligation to accept welfare recipients as tenants, have expressly reserved to the landlord the right to measure a welfare applicant's financial capacity and ability to pay rent. Even in "state action" cases, Courts

do not require that landlords accept all welfare recipients or that landlords treat welfare recipients more favorably than others. Thus, in *Male* v. *Crossroads Associates, supra,* the Court noted that:

> ". . . there is no requirement that welfare recipients . . . may secure apartments . . . without regard to their ability to pay." 469 F.2d 622.

The Court in *Colon* v. *Tompkins Square Neighbors, Inc., supra,* stated:

> ". . . this Court would not require defendants to accept those recipients of welfare funds *who would, of necessity, be required to devote an unreasonable portion of their income to the payment of rent, thereby making non-payment a likelihood.*" 294 F.Supp. 138 (emphasis supplied)

As has been shown, appellants' Economic Standard is directly related to the obligations of the tenant to pay his rent and is reasonable. If welfare recipients are unable to meet appellants' Economic Standard and are unable to obtain a guarantor, they are unacceptable as tenants for purely economic reasons, placing them in the same economic class with the "working poor" and any other people who cannot afford appellants' apartments.

It is respectfully submitted that appellants' Economic Standard is required by business necessity and that regardless of what that standard is, any reasonable economic standard applied even up to and including the allowance of 35% of the income for rent, would preclude any welfare recipient from renting appellants' apartments (Exhibit "S"). To find, as does the Court below (A859), that the decision as to how much of an individual's income should be allotted to rent should be left completely up to the applicant, who may take funds from food, clothing and other sources, without permitting the landlord to use some

reasonable economic measure, is to suggest that no landlord under the Fair Housing Act will ever be permitted to use any neutral, even-handedly applied economic standard. This, we suggest, ignores the "business necessity" test, which no Court has yet applied in a housing case.

Moreover, it is illogical, as shown above, to superimpose the business necessity test of the Fair Employment cases to the Fair Housing Act when there is a direct relationship between a person's ability to pay rent and his economic condition. We urge that the Court below erred in holding that the business necessity test applies to Fair Housing Act cases, and that even if it does apply, the test was met here.

POINT III

The Court below erred in its finding of a violation of the Civil Rights Act of 1866, because it made no finding of racially-motivated discrimination.

The Court below concluded that appellants' Economic Standard has had a racially discriminatory effect on welfare recipient applicants for appellants' apartments (A859) thereby violating the Civil Rights Act of 1866, 42 U.S.C. § 1982 ("Civil Rights Act"). There is no evidence in the record and no finding by the Court that this alleged discrimination was racially motivated. In fact, the testimony of appellees' own witnesses, Inez Stoney and Shirley Lee, is quite to the contrary.* Moreover, the uncontroverted tes-

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* *Stoney:*

"Q. When you walked into the office of Life Realty, was any suggestion made to you by anybody that they would not rent to you because you were black?"

"A. No." (A56)

Lee:

"Q. Did anybody in Life Realty ever suggest to you, in words or substance, they wouldn't rent to you because you were black?"

"A. No." (A77)

timony of appellants' witnesses is that there has never been any racially-motivated discrimination in the rental of appellants' apartments (A526, 715, 750).

The Supreme Court held that only *racially-motivated* discrimination violates the Civil Rights Act of 1866. *Jones* v. *Alfred H. Mayer,* 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969); See also *Bush* v. *Kaim,* 297 F.Supp. 151 (N.D. Ohio, 1969).

The language in *Jones* v. *Mayer, supra,* is especially revealing because the Supreme Court was endeavoring to provide the broadest interpretation of the statute when it stated:

> ". . . [42 U.S.C. Sec. 1982] must encompass every *racially-motivated* refusal to sell or rent. . . ." 392 U.S. 421, 422 (emphasis supplied).

The Court in *Bush* v. *Kaim, supra,* said:

> "The Court must determine in each case whether the refusal or failure on the part of the landlord . . . to rent . . . was *motivated* by racial considerations, was based *solely* on account of race, or was made *because* the plaintiff is a negro." 297 F.Supp. 162

The Court below did not find that any of appellants' actions are or were in any way racially-motivated, nor did appellees offer any proof on that question. The fact that any discrimination must be racially-motivated, places a heavy burden on appellees, as is futher outlined in *Bush* v. *Kaim, supra:*

> "Section 1982 does not prohibit an owner from considering factors *other than* race in determining whether to sell or rent his property to a negro, or to any other person for that matter. An owner may refuse to rent or sell to anyone, negro or white, for any reason he chooses *so long as the motivating rea-*

son for this decision is not the individual's race or color . . . The statute merely prohibits him from refusing the negro solely because he is a negro." 297 F.Supp. 162 (emphasis supplied)

All of appellants' prospective tenants, black, Puerto Rican or white, are measured by the same Economic Standard. This Economic Standard results in a rejection of some applicants for appellants' apartments, solely because of their inability to meet the Economic Standard referred to above, a standard which is not prohibited by the Civil Rights Act of 1866.

POINT IV

The Court below erred in finding that appellants were in violation of the Fair Housing Act and the Civil Rights Act of 1866 because expert testimony and statistics upon which it based its findings were inadmissible.

Appellants respectfully suggest that (i) the testimony proffered by appellees' experts (Drs. Bickel and Indik), and timely objected to by appellants, was irrelevant and based on inadmissible hearsay, and (ii) appellees' experts were not competent to testify as experts with respect to the issues in this case.

A. The Evidence Adduced Through Appellees' Experts Is Irrelevant and Immaterial to the Issues in This Case and Therefore Inadmissible

It is fundamental that evidence must be relevant to the facts in issue in the case on trial. *In re Dale's Will,* 159 Misc. 578 (Surr. Ct., Kings County, 1936); *Madan* v. *Sherard,* 73 N.Y. 329 (1878).

The Court below found that if appellants' 90% Rule was applied to all renters presently renting apartments in ap-

pellants' rental range*, 53.1% of all whites, 70.4% of blacks and 74.8% of Puerto Ricans would be excluded (A852). The Court also found that appellants' 90% Rule acts to exclude everyone earning less than $10,500 per year; that 24.1% of white households, 5.8% of black households and 2.6% of Puerto Rican households can qualify for appellants' apartments (A852, 853).

All of these findings and others in the paragraph entitled "The Statistical Position of Public Assistance Recipients in the New York City Community" (A851), were based solely on the testimony of Dr. Bickel and Exhibits "16", "17" and "18" introduced by him. Those exhibits were prepared by Dr. Bickel, using statistics taken from the United States Census and mathematically applying appellants' 90% Rule (A96).

An examination of Dr. Bickel's testimony shows that none of the statistics or other testimony so adduced, relates to appellants' buildings and practices and none of the statistics or testimony pertained to the class which appellees represented in this action, namely, "all welfare recipients within the metropolitan area who may seek accommodations in buildings owned or operated by Lefrak interests" (A67a).

Dr. Bickel admitted that he made no study about welfare recipients in determining the people who would be excluded from appellants' buildings and that he made no study of the class involved herein when preparing the exhibits upon which he based his opinion** (Exhibits "16", "17" and "18").

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* The Court's findings with respect to appellants' rental range were erroneous. See paragraph "D" of Statement of Facts, *supra*.

** "Q. Dr. Bickel, did any part of any of the study that you made involve welfare recipients?"

"A. Only implicitly as they are included with the other households."

(footnote continued on following page)

Moreover, Dr. Bickel, in preparing these exhibits, made no inquiry as to the area or the racial makeup of the geographical areas serviced by appellants' buildings.* In fact Dr. Bickel admitted that in preparing his exhibits, he was addressing his analysis to a different question than that which related to appellants' building. Dr. Bickel made no allowance for the fact that the racial makeup varies from Borough to Borough, admitting that he could not tell what impact that would have on his statistics.**

(footnote continued from preceding page)

"Q. Aside from that, were you asked or did you focus in any respect on welfare recipients as a group of people?"

"A. In the analysis I've described to you, no, I didn't."

"Q. So that nothing in Exhibit 18 for identification, the one which has just been offered in evidence, has anything in it which would separate welfare recipients as distinguished from any other class of people; is that correct?"

"A. In and of itself, that is correct, yes."

"Q. And that's true of all the other studies and reports that you did in connection with this case; is that correct?"

"A. Not quite in that I've always familiarized myself with the research work that was done in this general area by the Rand Corporation that does make this distinct but, as far as the analysis that I've described to you, it's quite correct." (A114)

* "Q. Why didn't you ask these questions and do all this when you were doing this 90%"

"Did you ever ask Miss Balen or anybody else to tell you the area that Lefrak is servicing?"

"A. What do you mean? I'm aware which Borough Lefrak has apartments in."

"Q. You just said you needed the areas they were servicing. Did you ever make that request before today?"

"A. No. I'd have to know the area, in which proportion they are."

"Q. Didn't you make this inquiry in making your study?"

"A. No, since the question I was addressing was a somewhat different one." (A165)

** "The Court: What effect does that have on your study, doctor, assuming that's true?"

"The Witness: That the racial proportions vary significantly from borough to borough?

(footnote continued on following page)

Dr. Bickel expressed his ignorance of the facts relating to appellants' buildings when he admitted that he didn't know the actual rentals of appellants' buildings and, in fact, had just assumed that the actual rentals would be close to the figures he used.*

Appellants moved to dismiss Dr. Bickel's testimony on the grounds that the entire focus of it, as based on his statistics, was made without regard to the class, as constituted in the action and without regard to appellants' actual situation (A311). His statistics and testimony are irrelevant to this issues in this case, rendering them inadmissible.

On the basis of Dr. Indik's testimony, the Court found that:

> "Ninety-seven percent of the public assistance recipients live in pre-1929 buildings and a vast majority of them live in the oldest, most poorly maintained buildings in the city. The City's poverty areas are racially and ethnically segregated housing 80.7 percent of the public assistance recipient population. Three-fourths of the buildings housing whites exclusively have no public assistance recipients in their buildings while less than half of all black and less than

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(footnote continued from preceding page)

"The Court: Yes."

"Mr. Brodsky: And from block to block, east side of Manhattan to the west side of Manhattan."

"The Court: I was just wondering what impact it had on your studies, if there was differences of that type."

"The Witness: I don't really know." (A222, 223)

* "Q. It would have been better to know the actual rents, wouldn't it?"

"A. No. This is a good sample. The actual rentals should be close to this."

"Q. Did you ask whether the actual rentals were available?"

"A. No. I had no communication with the Lefrak Organization." (A270, 271).

a quarter of the Puerto Rican buildings have no public assistance tenants." (A851, 852)

These findings were based entirely upon the testimony of Dr. Indik (A395-434) and appellees' Exhibits "12", "13", "14", "15", "28" and "29" (put into evidence through Dr. Indik) which were nothing more than copies of tables taken from a book entitled: The Ecology of Welfare (A428-432). These tables related only to welfare recipients living in rent controlled buildings in New York City (A424). There is no evidence that any of appellants' buildings are rent controlled.

These exhibits and the accompanying testimony are irrelevant because they do not relate in any way to the facts in issue in the case at bar. They have nothing to do with appellants buildings* and make no impact on the question as to whether or not appellants' 90% Rule is racially discriminatory.

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* "Q. Professor Indik, did any of your studies ever isolate, in any way, any of the buildings owned by what we call in here the Lefrak Organization?"

"A. I'm not sure how to answer this question for two reasons." The first one is that I am not completely sure whether there are any welfare recipients who are in our study of welfare recipients that also had direct contact with the Lefrak Organization."

"Q. You don't know one way or the other?"

"A. I'm not sure, no. It is possible that they were not. Further in the study of rent-controlled apartments, as reported in "The Urban Housing Dilemma" and this volume (indicating). "The Ecology of Welfare", I dont know whether Lefrak was an included landlord."

"He could be if he had rent-controlled apartments. "I'd be interested to find out if he did."

"Q. But you don't know, as you sit here, whether any of his apartments were included in the study?"

"A. If they were rent-controlled, I would assume from the process we went through of inclusion of rent-controlled apartments, that they were."

"Q. But you don't know?"

"A. I don't know for sure, no. . . .". (A432, 433)

Dr. Indik admitted that the information used as the basis for his random study of welfare recipients was received from the Human Resources Administration in New York City and, taken as truthful.* Thus, all of Dr. Indik's findings are based on hearsay and therefore inadmissible.

Appellants moved to strike the entire testimony of Dr. Indik (A435) and had previously objected to the entire line of questioning (A412). The testimony was the basis for material findings by the Court which were prejudicial to appellants and should have been excluded.

B. Appellees' Expert Witnesses Were Not Competent to Testify as Expert Witnesses in This Case

Any expert who testifies as such must be shown to be qualified with respect to the particular subject that relates to the issues in the case. Richardson on Evidence, 9th E.D. § 387; at p. 381; e.g. *Dougherty* v. *Milliken,* 163 N.Y. 527 (1900); *Ribak* v. *State,* 38 N.Y.S.2d 869 (Court of Claims 1942) not officially reported; *Morwin* v. *Albany Hospital,* 7 AD 2d 582 (Third Dept. 1959).

Appellants respectfully suggest that neither of appellees' experts is competent to testify because they are not skilled in the profession to which the issues in this case relate, i.e., Rental Housing; it's problems, economics and logistics. Dr. Bickel, an economist, admitted that he had no exposure

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* "The Witness: These are pages 20, 21, 22, 23 that speak of—I have to back up slightly—what we did in this study was take a random sampling of welfare recipients, the listing of all welfare recipients who were collecting as of, I think it was February of 1970."

"We got access to this through the cooperation of the HRA in New York City and we then took a random sample of welfare recipients and this random sample generated samples of people representative of all welfare recipients in New York City and what we did with that random sample was shown in the exhibits as a distribution of where they are presently living . . .". (A405).

to the housing field and admitted he was not an expert and had no experience in the housing area.*

His own testimony demonstrated the fact that he did nothing more than engage in a mathematical exercise (A96, 97) and was incompetent to give an expert's opinion (appellants so objected) as to the reasonableness of appellants' Economic Standard or any other economic standard. His testimony was the only testimony offered by appellees with respect to the reasonableness of appellants' Economic Standard.

Dr. Indik's expertise is also foreign to the housing field being totally within the ambits of psychology and social issues (A395-400). This background, we respectfully urge, does not operate to accord him the status of expert with respect to the issues in this case, i.e., the reasonableness of appellants' Economic Standard as applied to the income of prospective tenants and its discriminatory effect, if any.

Thus, as in *Ribak* v. *State, supra,* where an attorney gave expert testimony as to the value of land and *Morwin* v. *Albany Hospital, supra,* where a dentist gave expert testimony as to the performance of an anesthetist the testimony of appellees' experts should be stricken.

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* "Q. Now, I take it, Dr. Bickel, that you've never operated an apartment building. Is that correct?"

"A. No. I haven't."

"Q. And you have no idea, from your own experience, what experiences of a landlord are with regard to renting ratios and how much people pay in rent and who is a good tenant from the standpoint of paying rent?"

"A. Certainly. I have knowledge in that area. I can't claim to be an expert on that topic although I do have knowledge in that area. I have lived in apartments and so on, a knowledgeable economist. Put it that way." (A134)

POINT V

The class is improperly constituted and the appellees are not representative of the class.

The class in this action was initially determined, over the objection of appellants, by the Hon. Jack B. Weinstein as "all welfare recipients within the metropolitan area who *may* seek accommodations in buildings owned or operated by the Lefrak interests." (emphasis supplied) (A67a)

Thereafter, Mr. Justice Clark, in the judgment in this action, reconstituted the class to consist of "All public assistance recipients within the New York Metropolitan Area who have sought *or may seek* to rent accommodations in the residential buildings owned or operated by the Lefrak interests. (emphasis supplied) (A866)

Assuming, *arguendo,* that a floating, prospective, subjective class is properly constituted, the class action should be dismissed because appellees do not represent the class. It is well-established that in order to properly institute a class action, plaintiffs must be members of the class which they purport to represent. *Bailey* v. *Patterson,* 369 U.S. 31 (1962); *Davis* v. *Shultz,* 453 F.2d 497 (3rd Cir., 1971); *Brier* v. *Luger,* 351 F.Supp. 313 (M.D. Penna., 1972); *Eisman* v. *Pan American World Airlines,* 336 F.Supp. 543 (E.D. Penna., 1971).

In the instant case, a mass of evidence was permitted into the record by the Court with respect to discrimination against blacks, Puerto Ricans and welfare recipients in New York City. Whites make up 23% of the welfare recipients in New York City, while blacks and Puerto Ricans make up 72% (A851). The Court below found that appellants violated the Fair Housing Act with respect to discrimination against all blacks and Puerto Ricans on a city-wide basis (A859).

It is submitted that Mrs. Boyd and Miss Stoney, both of whom are female, unmarried, black, residents of Brook-

lyn and who receive aid for dependent children, do not represent the class consisting of "All public assistance recipients within the New York Metropolitan Area who have or may seek to rent accommodations in the residential buildings owned or operated by the Lefrak interests" (A866)

It is respectfully submitted that appellees represent only black, unmarried mothers residing in Brooklyn, receiving aid for dependent children, who attempted to rent an apartment in appellants' buildings. This, we suggest, is the only class which they may represent. It is clear that they do not represent white people, either on or off of welfare, nor blacks who are not on welfare and who do not reside in Brooklyn. More particularly, appellees cannot represent Puerto Ricans in New York on a racial basis as Puerto Ricans or Spanish surnamed people are recognized as a separate and distinct racial group under the terms of the Fair Housing Act. *United States* v. *State of Texas,* 342 F.Supp. 24 (E.D., Texas, 1971), affd. 466 F2d 518 (5th Cir. 1972). Moreover, Puerto Ricans, along with Mexican-Americans or Americans with Spanish surnames, are acknowledged as a cognizable group in the 1970 United States census. *United States* v. *State of Texas, supra.*

Additionally, appellees fail as representatives of the class by virtue of the fact that they did not have the right to initiate a cause of action on behalf of a class in that they did not suffer the same injury alleged on behalf of the class. *Seligson* v. *Plum Tree, Inc.,* 55 F.R.D., 259 (E. D. Penna., 1972); *Greenstein* v. *Paul,* 275 F.Supp. 604 (S.D. N.Y., 1967), affirmed, 400 F.2d 580 (2d Cir., 1968).

Mrs. Boyd, was rejected for an apartment in one of appellants' buildings because of over-occupancy (A746). Appellees do not dispute and are not challenging appellants' occupancy standards. Mrs. Boyd, the mother of five children, had asked to see Apartment 5C at 1035 Clarkson Avenue, Brooklyn, a two-bedroom apartment (A746). Ap-

pellants' occupancy standards are that a two-bedroom apartment cannot be occupied by more than four individuals (Exhibit "U"). Regardless of Mrs. Boyd's testimony or any findings by the Court below, she was never, in any way, because of occupancy standards, eligible to rent that apartment and the question of the appellants' Economic Standard was never required to be raised.

Mrs. Boyd, never rejected because of her failure to meet appellants' Economic Standard, has not, therefore, personally suffered the injury complained of, i.e., being barred from obtaining one of appellants' apartments because her income was not sufficient to meet appellants' Economic Standard.

This failure to suffer the injury alleged against the class removes Mrs. Boyd as a member of the class and requires dismissal of the class action. *Seligson* v. *Plum Tree Inc., supra; Greenstein* v. *Paul, supra.*

Moreover, in the instant case, Mr. Justice Weinstein and Mr. Justice Clark improperly created a floating, subjective, prospective and amorphous class by including as part of that class people who might possibly have an idea of moving into appellants' buildings. As the Court said in *Eisman* v. *Pan American World Airlines, supra:*

> ". . . where the . . . description of the purported class depends on the subjective state of mind of a particular individual, it [renders] it difficult, if not impossible, for the Court to determine whether any given individual is within or without the alleged class." 336 F.Supp. 547.

In *Eisman* v. *Pan American World Airlines, supra,* plaintiffs were attempting to create a class representing those who would purchase tickets from the defendants in the future. The Court ruled that the case was not properly maintainable as a class action. Similarly, in the instant case, the Courts below created a subjective class of people who may or might attempt to rent appellants' apartments

in the future. This, we submit, renders it impossible for the class to be given the proper definition. As a result, the class action should be dismissed. See, also, *Chaffee* v. *Johnson,* 229 F.Supp. 445, 448 (S.D.Mississippi, 1964), affirmed, 352 F.2d 514 (5th Cir., 1965), cert. denied, 384 U.S. 956 (1966).

For the above reasons, this action should be dismissed.

POINT VI

The Court below erred in the admission of certain testimony of Mr. Burdick because appellants were denied their right to cross-examination in violation of the Fifth and Sixth Amendments to the Constitution.

The Court below found that there are "approximately 480 public assistance recipients occupying apartments in defendants' buildings" (A854). The only evidence to support that conclusion came from Mr. Burdick, an employee of the Department of Social Services ("DSS"), who testified, over objections (A316, 334), that Exhibits "20" and "21", prepared by DSS, showed "the number of cases to which we were sending welfare checks in all of the [appellants'] buildings listed on pages one through four of the exhibit" (A332). We urge that the admission in evidence of this testimony was error because appellants were denied their right to cross-examine on this issue, a right guaranteed by the Sixth Amendment to the Constitution and the "due process" clause of the Fifth Amendment to the Constitution.

When appellants attempted to cross-examine Mr. Burdick and question the accuracy of the exhibits, asking the names of the alleged welfare tenants in appellants' buildings, how long they had been tenants in the buildings, how many persons were living in each apartment and whether they had been paying their rent on time, the information was refused as confidential (A317, 343). Thus, all ap-

pellants had were the conclusions of DSS, without the opportunity to cross-examine on this issue.

As the Court said in *Friedel* v. *Board of Regents of University of New York,* 296 N.Y. 347, 352 (1947), "Cross examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact". See also *Alford* v. *United States,* 282 U.S. 687, 691 (1931); *United States* v. *Hornstein,* 176 F.2d 217 (7th Cir., 1949).

Appellants were prevented from exercising their right of cross-examination with respect to the above information relied on by the Court for a material finding. As a result, appellants were severely prejudiced.

In *Summit Drilling Corporation* v. *Commissioner of Internal Revenue,* 160 F.2d 703 (10th Cir., 1947), a government witness testified as to a portion of the contents of a confidential document which by law he was prevented from disclosing and the taxpayer was prevented from cross-examining with respect to that information. The Court said:

> "And if the testimony is confined in its entirety to a privileged document and the authority of the witness to disclose the document is forbidden or so limited as to cut off the right of effective cross examination by the party against whom the testimony is offered, all of the testimony is subject to objection or motion to strike. *Gilbertson* v. *State,* 205 Wis., 168, 236 N.W. 539", 160 F.2d 706.

In the instant case, the testimony of Mr. Burdick, with respect to those welfare recipients being sent checks at appellants' building, was based solely on confidential records so as to cut off appellants' right of effective cross-examination. As demonstrated above, the Court relied on this evidence for a material finding of fact, i.e., that there were 480 welfare recipients living in appellants' building.

The admission in evidence of this teestimony while denying appellants the right to effective cross-examination in violation of the Fifth and Sixth Amendments to the Constitution, was prejudicial error by the Court below requiring a reversal.

POINT VII

The Court below erred in admitting into evidence a hearsay document on the racial mix of appellants' buildings.

The Court below found that: "In 1969 there were 269 black tenants and 93 Puerto Rican ones in defendants' apartments in Brooklyn; ten buildings had no blacks or Puerto Rican tenants; twenty-two buildings had no black tenants; five buildings had no Puerto Ricans; a total of thirty-seven buildings were entirely segregated. All but sixteen of the blacks live in 9 buildings'' (A855).

This finding was entirely based upon a hearsay document not qualified under the rules of evidence (Exhibit "30").

The document was never properly authenticated. Mr. Topper, an attorney who had been employed by the City Commission on Human Rights ("Commission") for six months was the witness called to qualify the document (A780, 782). Mr. Topper had no personal knowledge of the study (A782) and did not identify it as coming from the files of the Commission but merely identified the forms as the type used by the Commission*.

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* "Q. I show you these lists recorded on forms headed by the title 'City Commission on Human Rights' (indicating) and I ask you if those forms were prepared by the New York City Commission on Human Rights."

"A. These are the forms used by the New York City Commission on Human Rights, yes." (A780)

Moreover, counsel for appellees, in using Mr. Topper to introduce Exhibit "30", adduced no evidence that the exhibit was taken from the Commission's files (A780-786).

Such a report should not be admitted into evidence, as a proper foundation was not laid. *Donaldson Publishing Co.* v. *Bregman, Vocco and Conn, Inc.*, 253 F.Supp. 841 (S.D.N.Y., 1965), reversed on other grounds, 375 F.2d 639 (2nd Cir. 1967), cert. denied 389 U.S. 1036 (1967); 28 US.C. 1732.

This exhibit does not qualify under any exception to the hearsay rule and, in particular, does not qualify for the business record exemption within the meaning of 28 U.S.C. 1732. The basis of the rule is the probability of trustworthiness because the records are routine reflections of the day-to-day operations of the business. *Palmer, Trustees* v. *Hoffman, Administrator,* 318 U.S. 109 (1943).

Exhibit "30" can hardly be described as a routine reflection of the day-to-day operations of the Commission.

A record cannot be considered as having been made in the regular course of business unless made pursuant to established procedures for the systematic, routine and timely making and preserving of the record. *Standard Oil Company of California* v. *Moore,* 251 F.2d 188 (9th Cir., 1957), cert. denied, 356 U.S. 975 (1958).

The existence of a document or its presence in the file does not, without more, render it admissible. *National Labor Relations Board* v. *Sharples Chemicals, Inc.,* 209 F.2d 645 (6th Cir., 1954); *Hagan* v. *Ellerman and Bucknall Steamship Company, Ltd.,* 318 F.2d 563 (3rd Cir., 1963). This foundation was never laid by appellees. There was no evidence adduced with respect to how Exhibit "30" came into existence or the procedures used in making this report. Moreover, there is no evidence that the persons (whoever they were) who gathered and supplied the information, were under any business duty to do so. In that regard, the situation herein is similar to that in *Standard*

Oil Company of California v. *Moore, supra,* where a report was compiled from memoranda from the field sent in by employees of Standard Oil. The Court ruled the report inadmissible, stating:

> "In few, if any, of these instances was any showing made that the person supplying such information to the writer had the duty to do so. In most cases, the lack of such authority is self-evident, for the information was attributed to a service station operator or other person having no relationship with the company which could give rise to such a duty. Exhibits falling in this category were not admissible under § 1732." 251 F.2d 214.

In the case at bar, there is no evidence as to who gathered and supplied the information which resulted in the preparation of Exhibit "30", thereby reinforcing its inadmissibility.

There was some testimony by Mr. Topper with respect to a memorandum, prepared by someone other than Mr. Topper in the files of the Commission. This memorandum was never offered or introduced into evidence and, over the appellants' objection (A783), Mr. Topper was permitted to summarize and interpret what was in the memorandum. This testimony, even it were not hearsay and inadmissible, is not sufficient to cure appellees' failure to establish Exhibit "30"' as a business record.

The material finding by the Court that thirty-seven of appellants' buildings were segregated in 1969 (based totally on Exhibit "30"), is relied on by the Court in its finding of discrimination on the part of appellants. Thus, appellants have been prejudiced by the error of the Court below.

CONCLUSION

For the reasons stated, the judgment of the Court below should be reversed.

Respectfully submitted,

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United States Court of Appeals
For the Second Circuit

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thy Boyd, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

Inez Stoney,
Intervenor-Plaintiff-Appellee,

against

The Lefrak Organization and Life Realty, Inc.,
Defendants-Appellants.

On Appeal from the United States District Court
Eastern District of New York

AFFIDAVIT OF SERVICE

OF NEW YORK,
Y OF New York , ss:

Nathan Chambers being duly sworn,

s and says that he is over the age of 18 years and resides at 510 Atlantic , Brooklyn, New York

hat on the 29th day of July, 1974 at 35 West 125th St.

ved the annexed appendix and brief upon
rd R. Dudley, Jr., Attorney for Plaintiff-Appellee and Intervenor-
tiff-Appellee
s action, by delivering to and leaving with said attorney
two true copies thereof.

EPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the mentioned above.

ent is not a party to the action.

to before me, this 29th
July 1974

Nathan Chambers

John V. D'Esposito

JOHN V. D'ESPOSITO
tary Public, State of New York
No. 30-0932300
Qualified in Nassau County
mmission Expires March 30, 19

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